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Nos. 07-394 and 06-1666

In the Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR

MOHAMMAD MUNAF, ET AL.

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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QUESTIONS PRESENTED

Shawqi Omar and Mohammed Munaf are United States citizens who voluntarily traveled to Iraq, allegedly committed serious crimes there, were captured in an active combat zone by an international military force, and are being held under international authority and at the request of the Iraqi government by United States military personnel acting as part of that multinational military coalition. Munaf, a dual Iraqi-United States national, has also been tried and convicted by an Iraqi court of participation in a kidnapping-for-hire scheme in Iraq. Omar has not yet been tried by an Iraqi court because the district court preliminarily enjoined the multinational force from transferring him to Iraqi custody or allowing him to be tried in Iraqi courts.

The questions presented are:

1. Whether the United States courts have jurisdiction to entertain a habeas corpus petition filed on behalf of an individual such as Omar or Munaf challenging his detention by the multinational force.

2. Whether, if such jurisdiction exists, the district court in *Omar* had the power to enjoin the multinational force from releasing Omar to Iraqi custody or allowing him to be tried before Iraqi courts.

PARTIES TO THE PROCEEDINGS

The petitioners in No. 07-394 are Pete Geren, Secretary of the Army; William H. Brandenburg, Major General-Deputy Commanding General (Detainee Operations); and Timothy Houser, Lieutenant Colonel.

The respondents in No. 07-394 are Sandra K. Omar and Ahmed S. Omar, acting as next friends of Shawqi Ahmad Omar.

The petitioners in No. 06-1666 are Mohammed Munaf and Maisoon Mohammed, acting as next friend of Mohammed Munaf.

The respondents in No. 06-1666 are Pete Geren, Secretary of the Army; William H. Brandenburg, Major General-Deputy Commanding General (Detainee Operations); and Timothy Houser, Lieutenant Colonel.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 12
Argument 16
I. United States courts lack authority to review the habeas claims of individuals held abroad by a multinational force pursuant to international authority .. 17
A. United States courts lack jurisdiction in these cases under the rule of *Hirota* 17
B. The jurisdictional limitation recognized in *Hirota* is supported by core separation-of-powers principles 23
C. Jurisdiction does not turn on whether a habeas petitioner has been convicted by a foreign tribunal 28
D. The *Hirota* rule operates independent of citizenship 31
II. United States courts lack authority to block the MNF-I from surrendering custody of Omar and Munaf to Iraqi authorities 36
A. The district court had no basis to frustrate Iraq's criminal jurisdiction over persons within its borders 38
1. Nations have criminal jurisdiction over persons within their borders, including United States citizens, unless they have waived that jurisdiction 38

Table of Contents—Continued: Page

2. The Executive does not need any affirmative statutory or treaty authorization to relinquish custody of Omar or Munaf in Iraq 40
3. Iraq has sovereign discretion to establish modes of trial and punishment for offenses within its borders 45
B. The injunction against providing information to Iraq or permitting Iraq to try Omar is especially improper 48
Conclusion 51

TABLE OF AUTHORITIES

Cases:

Ahmad v. *Wigen*, 910 F.2d 1063 (2d Cir. 1990) 46
Al-Bandar v. *Bush*, 127 S. Ct. 854 (2007) 36
American Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2004) 24
Bishop v. *Reno*, 210 F.3d 1295 (11th Cir.), cert. denied, 531 U.S. 897 (2000) 32
Braden v. *30th Judicial Circuit Ct.*, 410 U.S. 484 (1973) 34
Burns v. *Wilson*, 346 U.S. 137 (1953) 34
Cozart v. *Wilson*, 236 F.2d 732 (D.C. Cir.), vacated as moot, 352 U.S. 884 (1956) 44, 50
Department of the Navy v. *Egan*, 484 U.S. 518 (1988) .. 28
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 29
Exxon Mobil Corp. v. *Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) 30

Cases—Continued: Page

Fleming v. *Page*, 50 U.S. (9 How.) 603 (1850) 25
Flick v. *Johnson*, 174 F.2d 983 (D.C. Cir.), cert. denied, 338 U.S. 879 (1949) 20
Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 24
Hirota v. *MacArthur*:
335 U.S. 876 (1948) 24, 25
338 U.S. 197 (1948) ..... *passim*
Holmes v. *Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972) 44, 45, 46, 47
Hussein, In re, 468 F. Supp. 2d 126 (D.D.C. 2006) 36
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 33
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 29
Kinsella v. *Krueger*, 351 U.S. 470 (1956) 38, 43
Lopez-Smith v. *Hood*, 121 F.3d 1322 (9th Cir. 1997) 46
Madsen v. *Kinsella*, 343 U.S. 341 (1952) 34
McElroy v. *Gualiardo*, 361 U.S. 281 (1960) 34
Mollan v. *Torrance*, 22 U.S. (9 Wheat.) 537 (1824) 29
Neely v. *Henkel*, 180 U.S. 109 (1901) 31, 33, 46, 47
Prasoprat v. *Benov*, 421 F.3d 1009 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006) 46
Preiser v. *Rodriquez*, 411 U.S. 475 (1973) 36
Ramadan v. *Bush*, 127 S. Ct. 1512 (2007) 36
Rasul v. *Bush*, 542 U.S. 466 (2004) 33, 34, 35
Reid v. *Covert*, 354 U.S. 1 (1957) 38
Republic of the Phillipines v. *Westinghouse Elec. Corp.*, 43 F.3d 65 (3d Cir. 1994) 43
Requested Extradition of Smyth, In re, 61 F.3d 711 (9th Cir. 1995), amended by 73 F.3d 887 (9th Cir.), cert. denied, 518 U.S. 1022 (1996) 46

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The Schooner Exchange v. *McFadden*, 11 U.S. (7 Cranch) 116 (1812) 38
United States v. *Arizti*, 229 F. Supp. 53 (S.D.N.Y. 1964) 46
United States v. *Kin-Hong*, 110 F.3d 103 (1st Cir. 1997) 46
United States ex rel. Keefe v. *Dulles*, 222 F.2d 390 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955) 32
United States ex rel. Stone v. *Robinson*, 431 F.2d 548 (3d Cir. 1970) 44
United States ex rel. Toth v. *Quarles*, 350 U.S. 11 (1955) 34
Valentine v. *United States ex rel. Neidecker*, 299 U.S. 5 (1936) 40
Williams v. *Rogers*, 449 F.2d 513 (8th Cir. 1971) 44
Wilson v. *Girard*, 354 U.S. 524 (1957) ..... *passim*
W.S. Kirkpatrick & Co. v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990) 46
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 25

Treaties and statutes:

Extradition Treaty, *done* June 7, 1934, U.S.-Iraq, 49 Stat. 3380 41
Art. I, 49 Stat. 3380 41

Treaties and statutes—Continued: Page

Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498:

§ (3)(a), 116 Stat. 1501 ..... 25, 45

18 U.S.C. 3184 ..... 40, 42

18 U.S.C. 3190 42

22 U.S.C. 287 *et seq.* 24

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28 U.S.C. 2241(c)(3) 20

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Miscellaneous—Continued: Page

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S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007) <http://www.un.org/Docs/sc/unsc_resolutions07.htm> 3

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Airgram from the Acting Political Advisor in Japan to the Secretary of State (Nov. 22, 1948) 19

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In the Supreme Court of the United States

No. 07-394

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals in No. 07-394 (07-394 Pet. App. 1a-39a) is reported at 479 F.3d 1. The opinion of the district court in that case (07-394 Pet. App. 40a-58a) is reported at 416 F. Supp. 2d 19. The opinion of the court of appeals in No. 06-1666 (06-1666 Pet. App. 1-9) is reported at 482 F.3d 582. The opinion of the district court in that case (06-1666 Pet. App. 10-38) is reported at 456 F. Supp. 2d 115.

JURISDICTION

In No. 07-394, the court of appeals entered judgment on February 9, 2007. The petition for rehearing was denied on May 24, 2007 (07-394 Pet. App. 61a-62a). On

August 15, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 21, 2007, and the petition was filed on that date. In No. 06-1666, the court of appeals entered judgment on April 6, 2007. The petition for a writ of certiorari was filed on June 13, 2007. In both cases, the jurisdiction of this Court rests on 28 U.S.C. 1254(1). As explained below, the government's position is that the United States courts lack jurisdiction over these habeas actions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions are reprinted in the appendix to the petition in No. 07-394 (07-394 Pet. App. 65a-67a).

STATEMENT

1. a. The Multinational Force-Iraq (MNF-I) is an internationally authorized entity consisting of military forces from approximately 27 nations, including the United States. 07-394 Pet. App. 100a-101a. The MNF-I operates in Iraq at the request of the Iraqi government and under United Nations (U.N.) Security Council resolutions authorizing it "to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to" the resolutions. *Id.* at 74a (S.C. Res. 1546, ¶ 10, at 4, U.N. Doc. S/RES/1546 (June 8, 2004)); see *id.* at 82a. Pursuant to its U.N. mandate, the MNF-I operates under the "unified command" of United States military officers, *id.* at 74a, but it is legally distinct from the United States military, has its own insignia, and includes high-ranking

officers from other nations (for example, the second in command, Lt. Gen. William Rollo, is a British officer).[1]

Under the letters referenced in the U.N. resolutions, the MNF-I is charged with, among other tasks, detaining individuals where "necessary for imperative reasons of security." 07-394 Pet. App. 86a. A letter attached to the most recent U.N. resolution states that the Government of Iraq is "responsible for arrest, detention and imprisonment tasks," but that the MNF-I should also undertake those activities with "maximum levels of coordination, cooperation and understanding with the Government of Iraq." S.C. Res. 1790, Annex I, ¶ 4, at 6, U.N. Doc. S/RES/1790 (Dec. 18, 2007). Pursuant to the U.N. resolutions, the MNF-I holds detainees, including individuals like Omar and Munaf who have committed hostile or war-like acts, as security internees.

In addition, under the authority of the U.N. resolutions, the Government of Iraq and the MNF-I agreed that the MNF-I would maintain physical custody of individuals suspected of criminal activity in Iraq pending investigation and prosecution in Iraqi courts under Iraqi law, because, among other reasons, many Iraqi prison facilities have been damaged or destroyed in connection with the ongoing hostilities. See 06-1666 Pet. App. 12;

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[1] The MNF-I's authority is subject to periodic review and reconsideration by the U.N. Security Council. Most recently, the Security Council extended the MNF-I's mandate through December 2008, see S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007) <http://www.un.org/Docs/sc/unsc_resolutions07.htm>. The President of the United States and the Prime Minister of Iraq recently announced that Iraq does not intend to request an additional extension of the MNF-I's mandate beyond 2008. *Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America* (Nov. 26, 2007) <http://www.whitehouse.gov/news/releases/2007/11/print/20071126-11.html>.

J.A. 48. The MNF-I holds those individuals as security internees during Iraqi criminal proceedings. J.A. 48.

b. The Central Criminal Court of Iraq (CCCI) is an Iraqi court under Iraqi governance, staffed by Iraqi judges who apply Iraqi law. 07-394 Pet. App. 104a. The CCCI is divided into two chambers: an investigative court and a felony trial court. *Ibid.* The investigative court conducts an investigative hearing, during which witnesses present sworn testimony, to determine whether there is sufficient evidence to warrant a criminal trial. *Id.* at 104a-105a. If the investigative court determines that there is sufficient evidence to proceed, it forwards a report to the trial court and recommends charges. *Id.* at 105a. The trial court sits in panels of three judges, who review the evidence submitted by the investigative court and may take additional evidence in formal proceedings. *Ibid.* In both investigative and trial proceedings, a defendant is entitled to be represented by counsel. *Id.* at 105a-106a. The proceedings are open to the public.

The CCCI has heard hundreds of cases since the fall of the Hussein regime, and many of those cases have involved individuals detained by the MNF-I during the course of the proceedings. The proper functioning of the court has been a key concern of the MNF-I in promoting stability and security in Iraq, given that "[e]stablishing the rule of law is the cornerstone of a free and democratic society." Joseph Giordono, *Trying Insurgents in Iraqi Courts Seen as Big Step in Rebuilding Legal System*, Stars and Stripes, Dec. 26, 2004 <www.stripes.com/article.asp?section=104&article=25317&archive=true)> (quoting MNF-I officer).

2. a. Shawqi Omar is an American-Jordanian citizen who voluntarily traveled to Iraq in 2002. See 07-394 Pet.

App. 2a, 101a-102a. In October 2004, he was captured by MNF-I forces during a raid of his Baghdad home. The raid was part of an effort to target associates of Abu Musab al-Zarqawi, the former Al-Qaeda leader in Iraq. See *ibid.* Omar was found harboring an Iraqi insurgent and four Jordanian Jihadist fighters. *Id.* at 101a-102a. Upon their capture, the individuals seized with Omar stated that, while living in his home in Baghdad, they surveilled potential kidnap victims, conducted weapons training, and engaged in other insurgent cell activities. *Id.* at 102a. Those individuals, as well as Omar, also explained that Omar planned to use his fluency in English to entice foreigners to return to his home where they could be kidnapped and ransomed. *Ibid.* At the time of his capture, Omar had several weapons and explosive-making materials in his home. *Id.* at 103a.

Since his capture, Omar has remained in the custody of members of the United States armed forces operating as part of the MNF-I. See 07-394 Pet. App. 1a. Following Omar's capture, a three-member MNF-I tribunal "conducted a proceeding that exceeded the due process requirements of Article 5 of the Third Geneva Convention of 1949." *Id.* at 103a. Omar was present at the hearing and had an opportunity to make a statement and to call available witnesses. *Ibid.* The tribunal found that Omar was a security internee under the authority of the U.N. resolutions, *i.e.*, that he posed a threat to the security of Iraq, and that he was also an enemy combatant in the war on terrorism, *i.e.*, that he had committed hostile and war-like acts. See *ibid.* In August 2005, the MNF-I determined to refer Omar to the CCCI for inves-

tigation and criminal prosecution for offenses committed in Iraq. *Id.* at 3a-4a.[2]

b. In December 2005, before the MNF-I referred Omar to the CCCI, one of Omar's wives and a son filed this next-friend habeas corpus petition on Omar's behalf in the District Court for the District of Columbia. 07-394 Pet. App. 4a. The district court issued a preliminary injunction directing that "the respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, shall not remove [Omar] from United States or MNF-I custody." *Id.* at 59a.

The district court rejected the government's threshold contention that it lacked jurisdiction under *Hirota* v. *MacArthur*, 338 U.S. 197 (1948) (per curiam), in which this Court held that the United States courts lacked jurisdiction over habeas petitions filed by Japanese nationals held abroad by a multinational force—the Allied Powers—pursuant to international authority. *Id.* at 198. In so holding, the district court pointed to the fact that Omar (unlike the habeas petitioners in *Hirota*) is a United States citizen. 07-394 Pet. App. 47a-48a. In addition, pointing to Justice Douglas's concurring opinion in *Hirota*, the district court reasoned that the fact that

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[2] To date, the MNF-I has held three status review hearings for Omar. Omar had the same opportunity to be present, make a statement, and call witnesses at each hearing. At the second hearing, held in March 2007, some of the individuals who were seized with Omar recanted their previous statements implicating Omar in insurgent activities. The March 2007 MNF-I tribunal nevertheless found sufficient evidence to continue detaining Omar. The most recent MNF-I tribunal likewise determined in September 2007 that Omar should continue to be detained as both a security internee and an enemy combatant.

Omar was in the immediate custody of United States armed forces created jurisdiction. *Id.* at 52a.

The district court entered its order barring Omar's release from MNF-I custody on the ground that "any physical transfer of [Omar] may prematurely moot the case or undo this court's jurisdiction." 07-394 Pet. App. 55a. Although the court recognized that Omar's "appearance before the CCCI does not constitute an immediate transfer to the Iraqi authorities," the court nevertheless also barred the MNF-I from presenting Omar for any proceedings before the CCCI on the theory that Omar might be "presented to the CCCI and in that same day, be tried, convicted and transferred to the CCCI's jurisdiction." *Id.* at 56a; see *id.* at 59a-60a.

c. The court of appeals affirmed. 07-394 Pet. App. 1a-39a.

i. The court of appeals held that the district court properly exercised jurisdiction. The court of appeals recognized that the case is like *Hirota* in that Omar is being held "overseas" by a "multinational force," but it held, based on its reading of circuit precedent, that the basic jurisdictional limitation established by *Hirota* for individuals held abroad by multinational forces pursuant to international authority does not govern this case because Omar has not yet been convicted by Iraqi courts based on the alleged criminal offenses for which he is being held. 07-394 Pet. App. 11a, 12a-13a.

A panel majority also upheld the district court's injunction. 07-394 Pet. App. 20a-26a. Although the panel majority recognized that the district court lacked authority to enjoin Omar's outright release, *id.* at 20a, the panel majority nonetheless concluded that the district court properly enjoined Omar's transfer to Iraqi custody, his release accompanied by information sharing

with the Iraqi government that would enable Iraq to arrest Omar upon his release, and his prosecution by the Iraqi courts. *Id.* at 20a, 23a, 25a. The court reasoned that such steps were warranted to preserve the district court's jurisdiction to consider the legality of any transfer of Omar to Iraqi custody. *Id.* at 23a-24a.

ii. Judge Brown dissented. 07-394 Pet. App. 27a-39a. She joined the panel's threshold ruling on jurisdiction, but would have vacated the district court's injunction against transfer. *Id.* at 27a. Judge Brown concluded that the courts had no basis to enjoin a transfer that "means simply allowing Iraqi officials to arrest and take custody of a person who was captured in Iraq and has remained there continuously—something they undeniably have a right to do." *Id.* at 35a-36a.

Judge Brown also objected to the scope of the injunction, which prevents any coordination between the MNF-I and Iraqi authorities as to Omar. She explained that, especially because Iraq has "exclusive jurisdiction to punish offenses against its laws committed within its borders," a court cannot "enjoin the United States military from sharing information with an allied foreign sovereign in a war zone * * * with the deliberate purpose of foiling the efforts of the foreign sovereign to make an arrest on its own soil, in effect secreting a fugitive to prevent his capture." 07-394 Pet. App. 34a, 36a (quoting *Wilson* v. *Girard*, 354 U.S. 524, 529 (1957)). "Any judicial order barring this sort of information sharing in a military zone," Judge Brown explained, "would clearly constitute judicial interference in a matter left solely to Executive discretion." *Id.* at 33a.

Judge Brown concluded that the injunction upheld by the panel majority constitutes an "unprecedented" interference "in the decisions of sovereigns acting jointly

within the same territory," amounts to a clear "trespass" on Executive authority, and imposes a "substantial impairment to the Executive's ability to prosecute the war efficiently and to make good on its commitments to our allies." 07-394 Pet. App. 34a, 36a-37a, 38a.

3. a. In March 2005, Mohammad Munaf, a dual Iraqi-United States citizen residing in Romania, voluntarily traveled with several Romanian journalists to Iraq, ostensibly to serve as the journalists' translator and guide. J.A. 32-33. Shortly after their arrival in Iraq, the group was kidnapped and held captive for over two months. J.A. 33. After the captives were freed, MNF-I forces detained Munaf because they suspected that he was involved in the kidnapping. J.A. 43.

In July 2005, a tribunal of three MNF-I officers reviewed Munaf's status and detention. J.A. 44. Munaf was present at the hearing, and he had an opportunity to hear the basis for his detention, make a statement, and call immediately available witnesses. *Ibid.* The panel determined that Munaf was a security internee who should continue to be detained for imperative reasons of security, in accordance with the MNF-I's U.N. mandate. *Ibid.* The MNF-I subsequently referred Munaf's case to the CCCI for investigation and possible trial. *Ibid.*

Munaf admitted on camera, in writing, and in front of the Iraqi investigative court that he participated as an accomplice in the kidnapping for profit of the Romanian journalists. J.A. 46. Munaf also appeared as a witness against his accomplices, including his brother-in-law. J.A. 46-48. Munaf was represented by counsel of his choice at the hearings, and was afforded the opportunity to present evidence and call witnesses. J.A. 45-46, 61. The Iraqi investigative court determined that there was

sufficient evidence to proceed, and it referred the case to the trial court. J.A. 48.

During the trial before the CCCI, Munaf and his attorneys again had the opportunity to present evidence and call witnesses. 06-1666 Pet. App. 14. Munaf and his codefendants testified at trial and recanted the confessions they had made in the investigative court, alleging that Iraqis or Romanians had forced them to confess. J.A. 62. After considering the evidence gathered by the investigative court, taking the additional statements from the defendants, and hearing argument from the Iraqi prosecutor and multiple defense attorneys, the trial court found Munaf and his five codefendants guilty of kidnapping and sentenced them to death. J.A. 61-63.[3]

An automatic appeal to the Iraqi Court of Cassation is pending. See J.A. 64-65. In accordance with its U.N. mandate and arrangement with the Government of Iraq, the MNF-I is continuing to hold Munaf on behalf of the Iraqi government until the resolution of his appeal.

b. In August 2006, after the CCCI investigative hearing but before his trial and conviction by the CCCI, Munaf, through his sister as next friend, filed this habeas corpus action seeking, among other relief, his release from MNF-I custody and an order barring his transfer to Iraqi custody. 06-1666 Pet. App. 14. Munaf also sought a temporary restraining order to prevent his transfer to the Iraqi authorities. *Ibid.*

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[3] A United States military officer, who is a member of the MNF-I, appeared in the trial court at the request of the Romanian government to make a formal complaint against Munaf and his codefendants, as is customary under the inquisitorial system. J.A. 62-63. Weeks before he made the complaint, the officer filed with the trial court a formal letter from the Romanian Embassy authorizing him to make the complaint on Romania's behalf. J.A. 63.

The district court denied Munaf's motion for a temporary restraining order and dismissed his habeas action for lack of subject matter jurisdiction. 06-1666 Pet. App. 10-38. The court concluded that this case was controlled by *Hirota* because Munaf is "in the custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations acting jointly," as well as in the "constructive custody of the Republic of Iraq, which is seized of jurisdiction in the criminal case against him." *Id.* at 22. The district court rejected Munaf's attempt to distinguish *Hirota* on the ground that he is a United States citizen. *Id.* at 24-25. The court explained that *Hirota* turned on the fact that the petitioners were held in custody under international, and not United States, authority, and that the source of authority does not change with citizenship. *Id.* at 25.

c. The court of appeals affirmed. 06-1666 Pet. App. 1-9.

i. The court held that dismissal was required by *Hirota* because neither the MNF-I nor the CCCI is "a tribunal of the United States." 06-1666 Pet. App. 2, 3-4. Like the district court, the court of appeals explained that "*Hirota* did not suggest any distinction between citizens and noncitizens who were held abroad pursuant to a judgment of a non-U.S. tribunal." *Id.* at 4. Rather, based on the court of appeals' decision in *Omar*, the court stated that "the critical factor in *Hirota* was the petitioners' convictions by an international tribunal." *Ibid.* (quoting 07-394 Pet. App. 12a). "As in *Hirota*," the court explained, "Munaf's case involves an international force, detention overseas, and a conviction by a non-U.S. court." *Ibid.* "[C]onducting habeas proceedings in the face of such [an international] conviction," the court con-

tinued, "risks judicial second-guessing of a non-U.S. court's judgments and sentences." *Id.* at 4-5.

ii. Judge Randolph concurred in the judgment. 06-1666 Pet. App. 7-9. He concluded that the district court had jurisdiction because Munaf "is an American citizen * * * held by American forces overseas," but he would have denied the habeas petition and request for an injunction against transfer on the merits. *Ibid.*

Judge Randolph concluded that the case is governed by *Wilson* v. *Girard*, *supra*, in which this Court set aside an injunction against the transfer of an American soldier within Japan to Japanese authorities to face charges stemming from a shooting in Japan. In *Wilson*, Judge Randolph explained, this Court reaffirmed that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." 06-1666 Pet. App. 9 (quoting *Wilson*, 354 U.S. at 529). Judge Randolph concluded that *Wilson* compels dismissal of Munaf's habeas action and request for an injunction against transfer. See 06-1666 Pet. App. 9.

SUMMARY OF ARGUMENT

The United States courts lack jurisdiction to review habeas petitions filed on behalf of individuals held by a multinational force abroad pursuant to international authority. This Court laid down that jurisdictional rule in *Hirota* v. *MacArthur*, *supra*, and that rule suffices to dispose of these cases. But even if the Court were to overrule *Hirota*, it would still be error to enter relief, like that granted in *Omar*, that would interfere with the foreign sovereign's efforts to prosecute individuals for criminal conduct within its borders.

I. The threshold jurisdictional question in these cases is governed by *Hirota*. That case establishes that United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority, including individuals held by United States forces acting as part of a multinational force. Because individuals held pursuant to international authority are not "in custody under or by color of the authority of the United States," the writ of habeas corpus does not extend to them. 28 U.S.C. 2241(c)(1). In *Hirota*, this Court held that the United States courts lacked jurisdiction to review habeas petitions filed by Japanese nationals who were held by United States forces, acting as part of the Allied Powers, pursuant to the judgment of an international tribunal. So too here, Omar and Munaf are held overseas pursuant to international authority by United States forces acting as part of a multinational force. That multinational force is acting at the request of the Government of Iraq and pursuant to U.N. resolutions, and it is holding Munaf and Omar pursuant to a determination by a tribunal convened under such international authority and, in Munaf's case, a conviction by an Iraqi court.

The exercise of habeas jurisdiction in these cases not only would contravene this Court's decision in *Hirota*, but would interfere with the Executive Branch's solemn international commitments and its ability to carry out its foreign policy and military objectives. Other nations would inevitably take offense if American courts were to assume the authority to review the determinations of international bodies in which United States forces or personnel may participate abroad, and if the United States courts assume such jurisdiction, the courts of other nations could do so as well. These concerns are

magnified by the fact that the United States courts would be reviewing detention determinations made, not unilaterally by the United States, but by the MNF-I and (especially in Munaf's case) by the Iraqi government.

The court of appeals erred in restricting *Hirota*'s holding to detainees (like Munaf) who have already been convicted of criminal offenses by a foreign or international tribunal. As Munaf's own counsel acknowledges, nothing in *Hirota*'s rationale supports such a "criminal conviction" limitation. Such a rule would also lead to anomalous results. In particular, it would mean that the existence of jurisdiction could fluctuate depending on the course of foreign criminal proceedings, and it would create a perverse incentive for United States courts to intervene prematurely to "preserve" their asserted jurisdiction by enjoining foreign courts from exercising their undoubted jurisdiction over persons within their borders, as the district court did in *Omar*.

II. Even if the Court were to not heed principles of *stare decisis* and overrule *Hirota*, it should still overturn the district court's extraordinary injunction against (1) transferring Omar to Iraqi custody, (2) sharing with the Iraqi government details concerning any decision to release him, and (3) allowing him to appear before the Iraqi courts to answer for alleged crimes committed in Iraq. That injunction represents an unprecedented intrusion on a foreign sovereign's jurisdiction over alleged criminal offenses committed within its borders and the Executive's own foreign policy and military objectives.

This Court long ago settled that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Wilson*, 354 U.S. at 529. *Wilson* forecloses the argument

that any *affirmative* statutory or treaty authorization is required to surrender custody of a United States citizen to a foreign sovereign when, as here, the individual is being held in the foreign country. Instead, *Wilson* puts the onus on the habeas petitioner to identify a statute or treaty *barring* such a transfer. Where there is no statute or treaty barring transfer, *Wilson* establishes that the United States courts lack authority to frustrate the jurisdiction of foreign sovereigns to bring individuals to justice for criminal offenses committed within their borders. Extradition case law is not to the contrary, because *Wilson*, like this case, does not involve an extradition of an individual from one country to another, but instead the transfer of an individual *within* a country.

Because no statute or treaty bars the transfer of Omar to Iraq, *Wilson* controls and requires that the district court's injunction be set aside. Indeed, that conclusion is even stronger here than in *Wilson*. The MNF-I detained Omar and Munaf in wartime pursuant to its international authority to assist the Government of Iraq by partnering and coordinating with Iraqi security forces. Surrendering Omar and Munaf to Iraqi authorities to answer for criminal conduct in Iraq would directly advance the important international mission embodied by both the U.N. resolutions authorizing the multinational force and the MNF-I's arrangements with the Government of Iraq. Moreover, there not only is no statutory or treaty *barrier* to transferring Omar and Munaf to Iraqi authorities, but both United States law and the U.N. resolutions affirmatively authorize such a transfer.

The other aspects of the unprecedented injunction upheld in *Omar* are even more problematic under the principles discussed above and underscore the extent to

which the courts below intruded on core Executive responsibilities and international comity. Indeed, the error of the district court's injunction is exposed by the court of appeals' felt need to hold that, if the MNF-I releases Omar, it may not provide Iraqi authorities with information that would enable them to arrest him. The court of appeals recognized that release from custody in Iraq without such an unprecedented order would be little different from transfer in light of the Iraqi government's obvious interest in detaining Omar. That fact should have underscored the unavailability of habeas and the inappropriateness of an injunction. Instead, the court of appeals took the extraordinary step of limiting the ability of a multinational force to notify Iraqi authorities of the location of the release of a dangerous individual in Iraq. That injunction in effect puts the United States courts in the position of secreting a fugitive from Iraqi justice, and it directly intrudes on core Executive interests and security concerns in an active theater of combat.

Likewise, there is no basis for preventing the Iraqi courts from trying Omar while he *remains* in MNF-I custody. If the Iraqi courts were to convict Omar, that would only underscore the absence of any basis for a United States court to interfere with Iraq's sovereign interest in bringing him to justice for offenses committed in Iraq. But the possibility that Omar will be convicted for his actions in Iraq provides no basis for an American court to interfere with such foreign proceedings.

ARGUMENT

These cases present two distinct questions of exceptional importance to the separation of powers, the Na-

tion's conduct of foreign and military affairs, and the sovereign prerogative of foreign nations to try individuals for the commission of criminal offenses within their own borders. First, whether the United States courts have jurisdiction to review a habeas petition filed on behalf of a United States citizen held by a multinational force abroad pursuant to international authority. Second, if such jurisdiction exists, whether the United States courts have the power to enjoin the transfer of such an individual from the multinational force to the foreign sovereign so that he may stand for prosecution or serve his punishment for offenses committed in that foreign land. As explained below, this Court should hold that the United States courts lack jurisdiction over such a habeas action. At a minimum, even if such jurisdiction exists, the Court should hold that the United States courts lack authority to enter the type of injunction upheld by the court of appeals in the *Omar* case.

I. UNITED STATES COURTS LACK AUTHORITY TO REVIEW THE HABEAS CLAIMS OF INDIVIDUALS HELD ABROAD BY A MULTINATIONAL FORCE PURSUANT TO INTERNATIONAL AUTHORITY

A. United States Courts Lack Jurisdiction In These Cases Under The Rule Of *Hirota*

The threshold jurisdictional question in these cases is governed by this Court's decision in *Hirota*, which establishes that United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority, including individuals held by United States forces acting as part of a multinational force. Because individuals held pursuant to international authority are not "in custody under or by color of

the authority of the United States," the writ of habeas corpus does not extend to them. 28 U.S.C. 2241(c)(1).

1. In *Hirota*, this Court considered whether the "courts of the United States" (338 U.S. at 198) had jurisdiction to review petitions for writs of habeas corpus filed by Japanese citizens who were being held in Japan by a multinational force pursuant to international authority. The habeas petitioners alleged that they were "in custody under and by color of the authority of the United States" and in violation of the Constitution and laws of the United States. Mot. for Leave to File Pet. for Writ of Habeas Corpus at 25-26, *Hirota*, *supra* (No. 239, Misc.) (*Hirota* Mot.). The petitioners were in the custody of United States military personnel abroad acting as part of a multinational force—the Allied Powers. Specifically, the petitioners were held in the custody of the "Commanding General of the United States Eighth Army who held them pursuant to the orders of [General] MacArthur, Supreme Commander of the Allied Powers." *Hirota*, 338 U.S. at 199 (Douglas, J., concurring).

The *Hirota* petitioners were being "held in [such] custody pursuant to the judgment of a military tribunal in Japan." 338 U.S. at 198. The petitioners had been convicted by the International Military Tribunal for the Far East, a court established by General MacArthur acting "as an agent of the Allied Powers." *Ibid.*; *id.* at 199 (Douglas, J., concurring). Authorization to establish the tribunal came from an international body, the Far Eastern Commission. *Id.* at 206. After the *Hirota* petitioners were convicted and sentenced by the tribunal, they appealed to General MacArthur, who declined to intervene in the judgment and directed the Command-

ing General of the Eighth Army to execute some of the petitioners.[4]

At all times, "the chain of command from the United States to the Supreme Commander [was] unbroken." *Hirota*, 338 U.S. at 207 (Douglas, J., concurring). President Truman had designated General MacArthur to be the Supreme Commander. Harry S. Truman, *Directive to the Supreme Commander for the Allied Powers* (Aug. 13, 1945), *in* Suppl. to Documentary App. at 4, *Hirota*, *supra* (No. 239, Misc.). And the Far Eastern Commission was required "to respect the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces." *Hirota*, 338 U.S. at 206 (Douglas, J., concurring) (internal quotation marks omitted).

In considering whether the Court had authority to review the habeas petitions at issue, the Court focused on the source of authority pursuant to which the petitioners were being held. Because the Court was "satisfied that the tribunal sentencing these petitioners [was] not a tribunal of the United States," it held that "the courts of the United States ha[d] no power" to adjudicate the habeas petitions. *Hirota*, 338 U.S. at 198. The facts that (1) the petitioners were being held in the immediate custody of an American officer (acting as part of the multinational force), (2) the tribunal that convicted the petitioners had been established by a United States military officer under the direct command and

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[4] See *Hirota* Mot. 25; Airgram from the Acting Political Advisor in Japan to the Secretary of State (Nov. 22, 1948), *in* 6 U.S. Dep't of State, *Pub. No. 8681, Foreign Relations of the United States, 1948*, at 897-898 (1974) (*Foreign Relations*); Telegram from the Acting Political Advisor in Japan to the Secretary of State (Nov. 24, 1948), *in* 6 *Foreign Relations* 908.

control of the United States, and (3) the tribunal's rulings were subject to modification by that same United States military officer did not alter the Court's conclusion that jurisdiction was lacking. The crucial point, in the Court's view, was that, when General MacArthur established the relevant tribunal, he was "acting as" the Commander and agent of the Allied Powers, and therefore was acting under international authority (and not solely United States authority). *Ibid.*

As the District of Columbia Circuit observed shortly after *Hirota* was decided, the key to *Hirota*'s jurisdictional rule is the "source of [the] power" pursuant to which an individual is held. *Flick* v. *Johnson*, 174 F.2d 983, 984, cert. denied, 338 U.S. 879 (1949). That conclusion squares with the text of the habeas statute, which provides, in pertinent part, that "[t]he writ of habeas corpus shall not extend to a prisoner unless * * * [h]e is in custody *under or by color of the authority of the United States*." 28 U.S.C. 2241(c)(1) (emphasis added). Because an individual who is held abroad pursuant to international authority (and not solely United States law) is *not* "in custody under or by color of the authority of the United States," the writ of habeas corpus does not extend to such a detainee.

The habeas corpus statute also states that the writ does not extend to a prisoner unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). That provision, however, presumes that an individual is "in custody" under United States—not international—authority. Indeed, the *Hirota* petitioners alleged that they were being held "in custody in violation of the constitution, treaties, international engagements, and laws of the United States." *Hirota* Mot. 26. Yet in *Hirota* this

Court held that jurisdiction was lacking because they were held pursuant to a judgment of an international tribunal. 338 U.S. at 198. A contrary construction would open the United States courts to habeas claims filed by or on behalf of individuals held the world over pursuant to foreign judgments or laws.

2. The basic teaching of *Hirota* calls for dismissal of these cases. Here as in *Hirota*, the habeas petitioners are in the physical custody of United States military officers, but those officers are acting as part of a multinational force under international authority and holding the petitioners pursuant to a determination by a tribunal convened under such international authority.

At the request of the Government of Iraq (see p. 2, *supra*), the U.N. authorized the multinational force to operate in Iraq and to "take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to" U.N. Resolution 1546. 07-394 Pet. App. 74a. As one of those letters explains, that mandate includes "internment [of individuals within Iraq] where this is necessary for imperative reasons of security." *Id.* at 86a. Under the authority of the U.N. resolutions, the MNF-I agreed with the Government of Iraq that the MNF-I would "maintain[] physical custody of detainees while their cases are being heard by the CCCI." *Id.* at 106a.

Omar and Munaf are currently held under that authority pursuant to the determinations of three-member MNF-I tribunals—acting pursuant to such international authority—that they are security internees who should be detained for imperative security reasons. 07-394 Pet. App. 103a; J.A. 44, 48. That determination is a sufficient basis for their detention, and any challenge to that determination or their detention pursuant to international

authority comes within the rule of *Hirota*.[5] In that respect, they are like thousands of other security internees held by the MNF-I. In addition, Munaf is also being held pursuant to his criminal conviction by an Iraqi court. See J.A. 44, 48, 61. Thus, like the habeas petitioners in *Hirota*, Omar and Munaf are being held by a multinational force abroad pursuant to international authority. See J.A. 43; 07-394 Pet. App. 101a.

While the United States is, to say the least, a vital component of the MNF-I, that was no less true of the United States forces operating as part of the Allied Powers in Japan. See *Hirota*, 338 U.S. at 207 (Douglas, J., concurring) ("[T]hough the tribunal is dominated by American influence, it is nonetheless international in character."). Here, the U.N., the United States, and the 26 other nations participating in the MNF-I all view the multinational force as having a distinct identity from the forces of any particular nation. The courts below did not identify any basis to countermand that quintessential foreign affairs judgment and disregard the MNF-I's international origin and authority.

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[5] The three-member MNF-I tribunal determined that Omar was not only a security internee but also an enemy combatant. See p. 5, *supra*. Omar's detention by the MNF-I, however, is justified by international authority, and does not depend solely on United States authority, and the MNF-I has, pursuant to international authority, sought to refer Omar's case to Iraqi authorities. In this habeas action Omar has challenged his detention by the MNF-I *vel non* (and therefore his detention pursuant to international authority) and sought to enjoin his transfer to Iraqi criminal authorities. Should the United States choose to detain Omar as an enemy combatant after the international authority for his detention as a security internee were to expire (for example, through the expiration of the U.N. declarations authorizing the MNF-I), a different jurisdictional question would arise.

In addition, while the multinational force—pursuant to its U.N. mandate—operates subject to a unified American command, and while the U.S. chain of command ultimately runs to the President of the United States, that was no less true in *Hirota*. As discussed, the multinational force in *Hirota* operated under the "[s]upreme" command of General MacArthur, and the tribunal pursuant to whose judgment the habeas petitioners were being held had been "set up by General MacArthur." 338 U.S. at 198. Here, as in *Hirota*, however, the key is that the American forces that command and in part comprise the MNF-I are not operating solely under United States authority, but rather "as the agent of" a multinational force that was established by and operates pursuant to international authority. *Ibid.*[6]

B. The Jurisdictional Limitation Recognized In *Hirota* Is Supported By Core Separation-Of-Powers Principles

The restraint called for by *Hirota* is supported by fundamental separation-of-powers principles. As Justice Jackson observed as to *Hirota*, "the issues here * * * involve decision of war crimes issues secondarily, for primarily the decision will establish or deny that this Court has the power to review exercise of military power

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[6] In *Omar*, the court of appeals stated that "the government concedes * * * that [U.S.] forces operate 'subject to' no independent MNF-I authority." 07-394 Pet. App. 15a. It is not clear what the court intended by that statement. As the government made clear, the MNF-I is an international entity distinct from the United States and, while the MNF-I is under unified American command, the same was true of the multinational force in *Hirota*. See, *e.g.*, *Omar* Gov't C.A. Br. 5-6, 30; *Omar* C.A. Reply Br. 5-6; 9/11/2006 *Omar* Tr. 10-11. Indeed, the government specifically explained that it would "mischaracteriz[e]" the government's arguments to say that U.S. forces do not operate "subject to * * * multi-national authority." *Id.* at 20-21.

abroad and the President's conduct of external affairs of our Government." *Hirota* v. *MacArthur*, 335 U.S. 876, 879-880 (1948) (statement regarding setting motions for oral argument). Here as in *Hirota*, the challenged actions are not of the Executive acting alone, but those of the United States acting as part of a multinational force under international authority, and in partnership with a local foreign sovereign that unquestionably has jurisdiction to detain persons within its own borders pursuant to its own laws to enhance national security.

1. The Constitution grants the President authority to enter into executive agreements with allied foreign nations regarding the conduct of war. See, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2004). Pursuant to that authority—and consistent with a statutory framework establishing the parameters for the United States' participation in the U.N., see 22 U.S.C. 287 *et seq.*—the Executive agreed to participate in the MNF-I, and also agreed, in conjunction with U.N. Resolution 1546, that the MNF-I would undertake "internment where this is necessary for imperative reasons of security." 07-394 Pet. App. 86a. The MNF-I, including the United States, then entered into a further agreement with Iraq to hold the detainees that were referred for investigation and prosecution before the Iraqi courts during the Iraqi judicial proceedings. J.A. 48.

The habeas petitions in this case ask the United States courts to review determinations made by the multinational force that was authorized by the U.N. to carry out those international commitments in an active combat zone. "Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi* v. *Rumsfeld*, 542

U.S. 507, 531 (2004) (plurality opinion); see *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850). Moreover, Congress authorized the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to * * * enforce all relevant United Nations Security Council resolutions regarding Iraq." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § (3)(a), 116 Stat. 1501. Thus, the President's constitutional authority to enter into the relevant agreements "is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The exercise of habeas jurisdiction in these cases would interfere with the Executive Branch's international commitments, as well as its ability to carry out its military and foreign policy objectives. As Justice Jackson observed in *Hirota*, "[f]or this Court now to call up these cases for judicial review under exclusively American law can only be regarded as a warning to our associates in the trials that no commitment of the President or of the military authorities, even in matters such as these, has finality or validity under our form of government until it has the approval of this Court." 335 U.S. at 878 (statement respecting oral argument). "And since the Court's approval or disapproval cannot be known until after the event—usually long after—it would substantially handicap our country in asking other nations to rely upon the word or act of the President in affairs which only he is competent to conduct." *Ibid.*; see Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587, 644 (1949) (It will not promote the efforts "to work together [with

allied nations] for joint defense * * * to foster the idea that an American commander, even when exercising an Allied trust, works under some vague supervision by the United States Supreme Court.").

Other nations may inevitably take offense if American courts were to assume the authority to review the determinations of international bodies in which United States forces or personnel participate abroad. And if the United States courts were to assume this authority, there is no reason why the courts of other nations could not do so, potentially subjecting decisions of multinational bodies like the MNF-I, in which some 27 nations participate, to review and inconsistent judgments in multiple fora worldwide. As the government observed nearly 60 years ago in *Hirota*, when such joint international endeavors were far less common, "[t]he full reach of any assumption by this Court of competence in these matters cannot now be foreseen, but we emphasize the government's deep concern lest irreparable damage be done, and its hope for a complete and prompt termination of these efforts by petitioners to hamper and defeat vital international engagements." Br. in Opp. to Mots. at 74, *Hirota*, *supra* (No. 239, Misc.).

As the district court in *Munaf* observed, "no court in our country's history, other than [in *Omar*], has ever found habeas corpus jurisdiction over a multinational force comprised of the United States acting jointly with its allies overseas." 06-1666 Pet. App. 37. Given the potentially grave separation-of-powers and international repercussions of exercising such jurisdiction, this Court should insist on a clear showing of jurisdiction to justify such an unprecedented and far-reaching exercise of American judicial authority. The habeas petitioners in these cases have failed to make such a showing.

2. These concerns are magnified by the fact that the habeas petitioners in these cases ask the United States courts to review decisions made, not unilaterally by the United States, but by the MNF-I or the Iraqi government. MNF-I panels determined that Omar and Munaf present grave risks to the security of Iraq and should be referred for investigation and prosecution by the Iraqi courts. Moreover, the Iraqi courts found Munaf guilty of serious criminal conduct in Iraq. Even if any habeas relief awarded by the courts in these cases technically were styled to run solely against the United States, the actions of the MNF-I and the Government of Iraq would be impugned, and their authority infringed, by such relief. See *Sea Containers Ltd.* v. *Stena AB*, 890 F.2d 1205, 1213 (D.C. Cir. 1989).

Moreover, Omar and Munaf have made clear that they do not seek relief solely vis-a-vis the United States. In *Omar*, the court of appeals affirmed an injunction against the United States and all those acting in concert with it, including the MNF-I. 07-394 Pet. App. 27a, 59a. That injunction reflects the reality that the United States is not operating unilaterally here. But that reality should have led to the recognition that *Hirota* was applicable, not to a broader, more problematic injunction. Moreover, both Omar and Munaf have sought an injunction requiring their safe passage *out of* Iraq and return to the United States. J.A. 40, 123. Thus, they have made clear that mere release from their custody by United States forces acting as part of the MNF-I would not redress their claims; instead, they seek broader protection from the MNF-I and the Iraqi government. Review of these habeas petitions would therefore directly infringe the interests of other sovereigns, *viz.*, the Gov-

ernment of Iraq and the 26 other nations participating in the MNF-I.

3. Nor is it clear what standards would apply to the determinations that Omar and Munaf seek. Under the U.N. resolutions, the MNF-I has authority to detain individuals where "necessary for imperative reasons of security." 07-394 Pet. App. 86a. That is not a standard the United States courts are accustomed to considering, and it turns on precisely the type of security judgments that are constitutionally committed to the Commander in Chief. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 528-530 (1988). Any effort to replace that U.N.-adopted standard with a new United States standard would raise its own host of issues, especially considering the novelty of the habeas claims at issue here.

C. Jurisdiction Does Not Turn On Whether A Habeas Petitioner Has Been Convicted By A Foreign Tribunal

The court of appeals erred in determining that *Hirota*'s jurisdictional holding is limited to individuals who have been convicted of criminal offenses by a foreign or international tribunal. See 06-1666 Pet. App. 4; 07-394 Pet. App. 12a. The court of appeals recognized that both Omar and Munaf are being held abroad by an international force pursuant to international authority. 06-1666 Pet. App. 4; 07-394 Pet. App. 11a. But the court held that the district court could properly exercise jurisdiction over Omar's petition because, unlike Munaf, he has not been convicted by an Iraqi criminal court. 06-1666 Pet. App. 3-4; 07-394 Pet. App. 12a. To "preserv[e]" that purported jurisdiction in *Omar*, the court of appeals then upheld an injunction that prevents the Iraqi courts from trying Omar. *Id.* at 26a, 27a. In other words, the court of appeals viewed *Hirota* as establishing a rule

that bars review of detention by a multinational force once related foreign or international criminal proceedings reach judgment, but not before then.

1. As Munaf has argued (06-1666 Pet. 19), *Hirota* does not, and could not plausibly, rest on such a distinction. Instead, as discussed above, *Hirota* relied on the source of authority under which the petitioners were held, not on the existence of criminal convictions. See pp. 18-21, *supra*. While a foreign criminal conviction provides an international source of authority for custody, nothing in *Hirota* suggests that convictions are the *only* possible source of such authority. Individual who are held under international authority are fully subject to the *Hirota* rule (regardless of whether they are referred for criminal proceedings for their actions). And that is particularly true where, as here, the individuals are being held pursuant to a determination by a tribunal convened by the multinational force—acting under international authority—that they present security concerns and that they should be held pending further criminal proceedings by a foreign sovereign.

2. The court of appeals' re-conceptualization of *Hirota* is difficult to square with "the longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) (quoting *Mollan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)); accord, *e.g.*, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003). Under the court of appeals' approach, the district court had jurisdiction when Munaf

filed his habeas petition, but was divested of that jurisdiction when the CCCI convicted him.[7]

What is more, under the *Omar* court's view, if jurisdiction is present when a petition is filed because collateral foreign criminal proceedings have not yet been initiated or resulted in a conviction, then a district court may enter an injunction to *prevent* those proceedings from going forward. The *Omar* rule thus provides district courts with a perverse incentive to intervene precipitously and "preserve" their asserted jurisdiction by entering injunctions that interfere with the ability of foreign courts to exercise their undoubted jurisdiction over persons within their borders, as the district court did in *Omar*. As discussed below, the district court had no authority to enter such an injunction. See pp. 36-51, *infra*. But the very prospect of such injunctions underscores the problems with a rule that makes the existence of jurisdiction in this context turn on whether the habeas petition is filed before or after the conclusion of foreign criminal proceedings.

3. The court of appeals asserted in *Omar* that the fact of a conviction is dispositive because it means that "some form of judicial process has occurred." 07-394 Pet. App. 14a. But *Hirota* in no way turns on the fact or adequacy of some alternative process. *Hirota* is silent as to what process the petitioners received. 338 U.S. at 198. But even more fundamentally, *Hirota* addresses circumstances where the basic complaint is that the multinational or foreign tribunal—whether completed or not—is an inadequate substitute for the due process

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[7] One court's entry of judgment can have preclusive consequences on other pending litigation. See, *e.g.*, *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005). But "[p]reclusion, of course, is not a jurisdictional matter"; it is a defense on the merits. *Ibid.*

provided by United States courts. And, of course, the whole thrust of *Hirota* is that United States courts are not well-positioned to make those pronouncements. See also *Neely* v. *Henkel*, 180 U.S. 109, 123 (1901). Indeed, one of the *Hirota* petitioners' central allegations was that they were denied due process by the international tribunal, but the *Hirota* decision makes no mention of that assertion, and places no reliance on it. See, *e.g.*, Pet. Br. at 16, 20, *Hirota*, *supra* (No. 239, Misc.).

Finally, the degree of process received—whatever its impact on the merits—has nothing to do with the existence of jurisdiction. In contrast, the determination whether a prisoner is in custody under the authority of the United States, or of a multinational entity, goes directly to the question of habeas jurisdiction. See 28 U.S.C. 2241(c)(1). And, of course, a concern with ensuring that judicial process *occurs* provides no basis whatsoever for *enjoining* Omar's presentation to an Iraqi court for that very process.

D. The *Hirota* Rule Operates Independent Of Citizenship

Omar and Munaf argue (06-1666 Pet. 12-16; 07-394 Br. in Opp. 14-18) that United States courts have jurisdiction over their habeas petitions because they are United States citizens. But, as noted, the critical focus in *Hirota* was on the source of detention authority. *Hirota* turned no more on citizenship than on the completion of the foreign or international proceedings. To be sure, because the habeas petitioners in *Hirota* were aliens, the Court's decision does not specifically address whether its jurisdictional rule applies to citizens. But the failure of *Hirota* to focus on the petitioners' status as aliens—and failure to reserve the question of citizen-detainees—only underscores that the fact that mattered

in *Hirota* was not citizenship, but the fact that the petitioners were held under international authority. Citizenship does not change the source of authority under which a person is held. Either the person is held under international authority, or he is not. Thus, while the *Hirota* Court did not address the issue, Justice Douglas recognized in his concurring opinion that the rationale of *Hirota* does not lend itself to a citizenship exception. See 338 U.S. at 202-203, 205. So did the court of appeals here. 06-1666 Pet. App. 4; see 07-394 Pet. App. 12a.

1. Omar and Munaf argue that "citizenship is 'a head of jurisdiction.'" 07-394 Br. in Opp. 22 (quoting *Johnson* v. *Eisentrager*, 339 U.S. 763, 769 (1950)). But citizenship itself does not automatically confer habeas jurisdiction. If it did, the federal courts would be open on habeas to claims of United States citizens being held under the authority of any non-American tribunal. It is well settled, however, that federal courts may not entertain claims by United States citizens incarcerated by foreign nations under foreign law. See, *e.g.*, *United States ex rel. Keefe* v. *Dulles*, 222 F.2d 390, 391-392 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955). Indeed, habeas courts lack authority over cases involving American citizens detained under the authority of foreign convictions even when the petitioners are in the actual custody of the United States because they are serving their sentences here. See, *e.g.*, *Bishop* v. *Reno*, 210 F.3d 1295 (11th Cir.), cert. denied, 531 U.S. 897 (2000).

Neither the habeas statute nor the Constitution confers jurisdiction in the circumstances here. The habeas statute does not provide a separate right to habeas for citizens that would override the result in *Hirota*. And whatever the reach of the Constitution in other circumstances, in *Neely*, this Court held that "the provision[] of

the Federal Constitution relating to the writ of *habeas corpus* * * * ha[s] no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." 180 U.S. at 122. *Neely* involved crimes committed by an American citizen in Cuba when the United States was the sole occupying force of that country; its holding applies *a fortiori* to this case, where the crimes were committed against the sovereign government of Iraq and the United States is participating in a multinational force comprised of 27 nations.

2. The cases on which Munaf relies (06-1666 Pet. 13) for the proposition that citizenship is a font of jurisdiction are inapposite because they involve "petitioners * * * in the custody of the United States alone, in its capacity as the United States, and not by any multinational force" acting under international authority. 06-1666 Pet. App. 29. In other words, the cases relied upon by Munaf do not involve the critical factor that makes *Hirota* applicable; unlike the petitioners in *Hirota* and these two cases, the petitioners in the cases cited by Munaf *were* being held "in custody under or by color of the authority of the United States," 28 U.S.C. 2241(c)(1), and not pursuant to international authority.

In *Eisentrager*, for example, the habeas petitioners (who were not United States citizens) were indisputably being held under the exclusive authority of the United States. Indeed, this Court emphasized at the outset of its decision that "[t]he proceeding [pursuant to which the habeas petitioners were detained] was conducted wholly under American auspices." 339 U.S. at 766.[8]

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[8] Were it otherwise, *Eisentrager* could have been decided with a quick citation to *Hirota*. But *Eisentrager* focused on the status of the petitioners, not on the source of detention authority. For similar reasons, this Court's intervening decisions in cases like *Rasul* v. *Bush*, 542

Similarly, in *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), the petitioner was held in West Virginia following her conviction by the United States Courts of the Allied High Commission for Germany. *Id.* at 343-345, 357. The *Madsen* court explained that the United States Courts of the Allied High Commission for Germany were "in the nature of military commissions conforming to the Constitution and laws of the United States" that "derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops." *Id.* at 356, 357 (emphasis omitted); see *id.* at 358 (noting that the judges' authority derived from "the President"); *id.* at 371-372 (Black, J., dissenting). Other cases relied on by Omar and Munaf (*e.g.*, 06-1666 Pet. 13) similarly involve United States court martials undertaken pursuant to United States authority and law. See *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); *Burns* v. *Wilson*, 346 U.S. 137 (1953) (plurality opinion).

Nor do this Court's recent decisions in *Hamdi* and *Rasul* v. *Bush*, 542 U.S. 466, 481 (2004) provide "grounds for questioning *Hirota*'s continued vitality." 06-1666 Pet. App. 6. Neither *Hamdi* nor *Rasul* addresses the issue decided in *Hirota* or even mentions that opinion. In *Hamdi*, jurisdiction was undisputed

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U.S. 466, 481 (2004), and *Braden* v. *30th Judicial Circuit Ct.*, 410 U.S. 484 (1973), do not undermine the continuing validity of the *Hirota* rule. *Hirota* in no way turned on the territorial reach of the Great Writ. *Hirota* essentially assumed *arguendo* (before *Eisentrager* settled the matter to the contrary) that the writ could have extended to the petitioners if they were held by United States forces under United States law, but held that jurisdiction was absent for the independent reason that the petitioners were held under multinational authority.

because the petitioner challenged his detention by United States forces acting solely under domestic authority at the Naval Brig in South Carolina, and the habeas action was specifically limited to the prisoner's detention in the United States by United States forces alone. See 542 U.S. at 511, 525 (plurality opinion).

Rasul is similarly inapposite. The detainees in *Rasul* were being held by United States forces acting solely under United States authority. Thus, there was no assertion in that case that the United States military officers detaining the petitioners in the U.S. Navy base in Guantanamo Bay, Cuba, were acting under international authority. Indeed, this Court determined that those officers were acting in a territory over which the United States exercises "complete jurisdiction and control." 542 U.S. at 480 (citation omitted); see *id.* at 481-482. The Court also undercut the distinction Omar and Munaf seek to draw here by noting that the habeas statute "draws *no distinction* between Americans and aliens held in federal custody." *Id.* at 481 (emphasis added).

3. While *Hirota*'s source-of-authority rationale does not lend itself to a citizenship exception, the separation-of-powers concerns that support *Hirota* nevertheless would counsel strongly in favor of limiting any overruling of *Hirota* to the context of petitions brought by citizens. As a practical matter, limiting jurisdiction in these circumstances to habeas claims filed on behalf of citizens would limit the scope of disruption to the ongoing activities of the MNF-I and the Government of Iraq because the vast majority of the detainees held by the MNF-I are aliens.[9] Nevertheless, as discussed above, under a

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[9] Several aliens held by the MNF-I have already filed habeas petitions seeking injunctive relief prohibiting the MNF-I from trans-

proper application of *Hirota*, citizenship does not confer jurisdiction over the habeas petitions at issue.

II. UNITED STATES COURTS LACK AUTHORITY TO BLOCK THE MNF-I FROM SURRENDERING CUSTODY OF OMAR AND MUNAF TO IRAQI AUTHORITIES

After finding jurisdiction, the court of appeals in *Omar* upheld an injunction that bars the federal parties, and those acting in concert with them, from "remov[ing] [Omar] from United States or MNF-I custody." 07-394 Pet. App. 55a, 59a. Even if this Court overrules *Hirota* and holds that the court properly exercised jurisdiction, an injunction against Omar's *release* from the very custody that the court of appeals viewed as giving it jurisdiction would be indefensible under longstanding habeas practice because release from custody is the traditional *purpose* of the writ. See *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973) ("It is clear * * * that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."). Indeed, Omar sought, *inter alia*, that very re-

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ferring them to Iraqi custody. See, *e.g.*, *Ramadan* v. *Bush*, 127 S. Ct. 1512 (2007) (No. 06A894) (application for injunction pending appeal denied by the Court); *Al-Bandar* v. *Bush*, 127 S. Ct. 854 (2007) (No. 06A644) (same); *In re Hussein*, 468 F. Supp. 2d 126 (D.D.C. 2006) (motion for injunction and habeas petition denied for lack of jurisdiction under *Hirota*). While those petitioners had been convicted by a foreign tribunal before initiating their habeas actions (and therefore would be precluded from filing habeas claims under the court of appeals' "conviction" limitation), it stands to reason that foreign nationals detained by the MNF-I who are detained as a preventive matter or otherwise have not yet been convicted by a foreign tribunal would file habeas actions in the United States courts if this Court were to affirm in *Omar* without regard to citizenship.

lief in this case. J.A. 123. The very prospect of a court effectively enjoining a prisoner's release from custody turns the basic function of the Great Writ on its head.

Although the court of appeals recognized that the district court could not lawfully bar Omar's *release* from custody *vel non*, it re-characterized the injunction against his release as one against (1) transferring Omar to Iraqi custody, (2) sharing with the Iraqi government details concerning any decision to release him, and (3) allowing him to appear before the Iraqi courts to answer for alleged crimes committed in Iraq. See 07-394 Pet. App. 20a, 23a, 25a. Those extraordinary restrictions on the handling of a security internee in a foreign combat zone are even less justifiable than the district court's ban on Omar's outright release. The inability of the traditional habeas remedy to provide meaningful relief—because Iraqi authorities would exercise their sovereignty to take custody over someone who poses a security risk and has violated the domestic criminal laws of Iraq, which is precisely the course Omar seeks to evade—should have cautioned against granting habeas relief. Instead, it impelled the court of appeals to interfere even more deeply in the relationship between the United States military, the MNF-I, and the Iraqi government.

Munaf's request for an analogous injunction is even more inappropriate. Because the Iraqi courts have already convicted Munaf (one of Iraq's own citizens), his request for an injunction against his transfer to Iraqi custody not only raises the same international comity and separation-of-powers concerns as the unprecedented injunction upheld in *Omar*, but amounts to an impermissible collateral attack on his Iraqi conviction. In effect, the habeas petitioners seek an injunction from

the United States courts that would provide them with a right to be a fugitive from Iraqi justice while in Iraq for crimes committed in Iraq. Nothing in this Court's cases, or settled habeas practice, supports that result.

A. The District Court Had No Basis To Frustrate Iraq's Criminal Jurisdiction Over Persons Within Its Borders

1. Nations have criminal jurisdiction over persons within their borders, including United States citizens, unless they have waived that jurisdiction

This Court has long recognized that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Wilson*, 354 U.S. at 529; see *Kinsella* v. *Krueger*, 351 U.S. 470, 479 (1956) (nations have a "sovereign right to try and punish for offenses committed within their borders," generally including offenses committed by "American servicemen and their dependents," unless they "have relinquished [that] jurisdiction"); *Reid* v. *Covert*, 354 U.S. 1, 15 n.29 (1957) (plurality opinion) ("[A] foreign nation has plenary criminal jurisdiction, of course, over all Americans * * * who commit offenses against its laws within its territory."). That principle dates back at least to Chief Justice Marshall's observation in *The Schooner Exchange* v. *McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812), that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."

As Judge Randolph recognized, this Court's decision in *Wilson* invoking that universal principle is "conclusive" (06-1666 Pet. App. 8) here. In *Wilson*, this Court reversed a district court injunction—"very much like the one at issue here," 07-394 Pet. App. 36a n.5 (Brown, J.,

dissenting in part)—barring the United States military from transferring an American soldier (Girard) to Japanese authorities in Japan to face trial for the alleged shooting of a civilian during a training exercise in Japan. 354 U.S. at 525-526. The Court held that Japan "has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Id.* at 529. Because Japan had not surrendered that jurisdiction, a unanimous Court found "no constitutional or statutory barrier" to the Army's transfer of Girard to Japanese authorities to face trial, and therefore set aside the injunction against Girard's transfer. *Id.* at 530.

No treaty or statute bars the transfer of Munaf or Omar to Iraqi authority. Nor can Omar or Munaf point to any relevant waiver of jurisdiction by Iraq. Accordingly, *Wilson* controls here and requires that the *Omar* injunction be set aside. Indeed, this case presents a more compelling situation than *Wilson* for setting aside the injunction against Omar's transfer to Iraqi authorities. Unlike Girard, who was stationed in Japan when he committed the alleged offense, Omar voluntarily traveled to Iraq and committed alleged criminal offenses there on his own time. Moreover, unlike Girard, Omar was captured in an active combat zone while harboring an Iraqi insurgent and four Jordanian fighters, and while possessing weapons and improvised explosive device- making materials. See 07-394 Pet. App. 103a. In addition, unlike Girard, Munaf has already been convicted by an Iraqi court of criminal conduct in Iraq. 06-1666 Pet. App. 2.[10]

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[10] As was true with respect to the United States Army in *Wilson* (see 354 U.S. at 529-530), the fact that the MNF-I retains discretion under

2. *The Executive does not need any affirmative statutory or treaty authorization to relinquish custody of Omar or Munaf in Iraq*

Omar argues (07-394 Br. in Opp. 33-34) that the United States cannot release him to Iraqi custody without statutory or treaty authorization. Even in peacetime, however, there is no such requirement. As *Wilson* confirms, United States law simply does not obligate the United States (or the MNF-I) to shelter alleged criminals in Iraq from the Iraqi justice system, much less convicted criminals like Munaf. And even if the United States needed express authorization to defer to Iraq's criminal jurisdiction within its own borders, the U.N. resolutions, coupled with Congress's direction to enforce those resolutions, would provide it. Omar's contrary argument—which appears to apply equally to citizens and non-citizens alike—cannot be squared with either Iraq's sovereign prerogatives or the Executive's discretion over such sensitive foreign policy matters, and is tantamount to claiming a right to be a fugitive from Iraqi justice in Iraq for conduct committed there.

a. This Court has held that statutory or treaty authorization is generally required before the United States may *extradite* a person from the United States to a foreign country. See *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936); 18 U.S.C. 3184. Thus,

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its U.N. mandate and arrangements with Iraq to determine the circumstances in which it will refer cases to the CCCI or transfer individuals to Iraqi criminal authorities does not alter the analysis. That discretion does not eliminate Iraq's jurisdiction over criminal matters within its own borders or authorize the United States courts to interfere with an MNF-I determination to refer a case to the CCCI or transfer an individual to Iraqi custody.

if Omar and Munaf were in the United States, they presumably could be extradited only pursuant to such authorization. See Extradition Treaty, *done* June 7, 1934, U.S.-Iraq, 49 Stat. 3380.

As Judge Brown explained, however, the transfer of a person *within* a foreign country is not an extradition, and involves different considerations. 07-394 Pet. App. 35a. "Extradition is the process by which persons charged with or convicted of crime against the law of a State *and found in a foreign State* are returned by the latter to the former for trial and punishment." 6 Marjorie M. Whiteman, *Digest of International Law* 727 (1968) (Whiteman) (emphasis added); accord 4 Green Haywood Hackworth, *Digest of International Law* § 304, at 1 (1942). Consistent with that understanding, our extradition treaty with Iraq, like many other extradition treaties, authorizes the surrender of "any person charged or convicted of [certain crimes] committed within the jurisdiction of one of the High Contracting Parties * * * *and who shall be found within the territories of the other High Contracting Party*." Art. I, 49 Stat. 3380 (emphasis added); see 6 Whiteman 727-728; 1 John Bassett Moore, *A Treatise on Extradition and Interstate Rendition* 139-140 (1891). Such treaties are not so limited because the countries perversely wanted to authorize the extradition of fugitives across national borders, but not to permit the surrender of fugitives within a country. Rather, they are so limited because the United States' surrender of a fugitive *within* a foreign country is not an extradition, and does not require any treaty authorization at all.

Thus, the United States statute governing extradition to foreign countries—entitled "Fugitives from foreign country to United States"—applies by its terms

only to persons in the United States. 18 U.S.C. 3184. That statute authorizes a United States court to commence extradition proceedings by issuing a warrant if the person is "found within [the court's] jurisdiction," or "if the whereabouts within the United States of the person charged are not known or, if there is reason to believe that the person will shortly enter the United States." *Ibid.* The court can then consider evidence that could be "received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped." 18 U.S.C. 3190. The reason those extradition statutes do not apply to transfers of custody within a foreign country is that such transfers are not extraditions, and do not require statutory or treaty authorization or judicial approval.

b. Transfer of custody within a country raises fundamentally different issues from extradition. In the extradition context, "the person in question is in the requested state either because he believes refuge can be found there or because of other circumstances." M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 30-31 (4th ed. 2002) (*International Extradition*). Historically, the surrender of such a person to a foreign state "was deemed an exceptional measure running against the traditions of asylum and hospitality." *Id.* at 31. As cases like *Wilson* reflect, however, that historical tradition is reversed when the person is already in the country that wishes to arrest him for conduct there. In that circumstance, the United States may surrender the fugitive unless there is a positive prohibition against doing so. See pp. 38-39, *supra*.

As a practical matter, moreover, Omar has no legal right to block his release from custody, and "[w]here, as here, the prisoner is physically in the territory of the

foreign sovereign that seeks to make the arrest, release is tantamount to transfer." 07-3[illegible] Pet. App. 36a-37a (Brown, J., dissenting in part); see pp. 36-37, *supra*. Indeed, when the United States has custody of a person in a foreign country, it is a misnomer to refer to the United States "transferring" the person to that country's custody. Rather, the foreign country presumptively has a sovereign right to arrest the person within its borders pursuant to its laws, and the United States (including its courts) generally lacks authority to *interfere* with that arrest. See *Republic of the Phillippines* v. *Westinghouse Elec. Corp.*, 43 F.3d 65, 79 (3d Cir. 1994).

c. Settled practice with status-of-forces agreements confirms those points. As noted, each nation generally has criminal jurisdiction over persons, including foreign military personnel, within its borders. *Kinsella*, 351 U.S. at 479. If the United States has military forces stationed in a foreign country, however, it generally enters into a status-of-forces agreement that includes provisions concerning criminal jurisdiction over United States personnel. While the terms of those agreements vary, the foreign country typically permits the United States to exercise primary criminal jurisdiction over alleged offenses committed by its own armed forces in the performance of official duty, but the foreign country typically retains primary criminal jurisdiction over other offenses. *International Extradition* 93. Either state may, however, cede its jurisdiction over a particular matter to the other state, *ibid.*, and if the United States cedes its jurisdiction, it can surrender custody of the individual to the foreign sovereign, see *Wilson*, 354 U.S. at 529-530. The "[s]urrender of American servicemen for foreign trial pursuant to status-of-forces agreements

has received consistent judicial approval." *Holmes* v. *Laird*, 459 F.2d 1121, 1216 n.32 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972); see, *e.g.*, *Wilson*, 354 U.S. at 529-530; *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971); *United States ex rel. Stone* v. *Robinson*, 431 F.2d 548 (3d Cir. 1970); *Cozart* v. *Wilson*, 236 F.2d 732 (D.C. Cir.), vacated as moot, 352 U.S. 884 (1956).

Omar has argued (07-394 Br. in Opp. 33) that the executive agreement in *Wilson* was "signed pursuant to a * * * treaty." The treaty, however, simply authorized the Executive to enter agreements "concerning '[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan.'" *Wilson*, 354 U.S. at 526-527 (quoting the treaty). That general authorization did not specifically permit the surrender of Americans to Japanese custody. No such authorization was needed because, as the District of Columbia Circuit has explained, Japan already had the sovereign right to arrest, prosecute, and punish Americans in its country for violation of its laws. *Cozart*, 236 F.2d at 732, 733. Thus, the status-of-forces agreement "actually is a Japanese *cession* to the United States of criminal jurisdiction" to the extent that it permits the United States to exercise jurisdiction in some cases. *Robinson*, 431 F.2d at 550 n.2.

While the history and effect of status-of-forces agreements supports the conclusion that foreign sovereigns have jurisdiction over individuals who commit criminal offenses within their borders, those agreements are also designed to deal with the situation where foreign nations allow the armed forces of another nation to enter their borders and where the foreign nation seeks to provide protection for its own troops. This case does not involve members of the United States military who

have committed criminal offenses in Iraq, or members of another nation's armed forces who were legitimately stationed in Iraq, but rather individuals who voluntarily traveled to Iraq and committed serious criminal offenses there. As the District of Columbia Circuit has observed, a local foreign sovereign's exercise of criminal jurisdiction over such individuals is "indubitably * * * appropriate." *Holmes*, 459 F.2d at 1216.

d. In any event, even if statutory authorization were required, Congress provided it by authorizing the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to * * * enforce all relevant United Nations Security Council resolutions regarding Iraq." Pub. L. No. 107-243, § (3)(a), 116 Stat. 1501. Those resolutions call on the MNF-I to establish a security partnership with the Government of Iraq and to coordinate with it on matters of security. See pp. 2-3, *supra*. As Judge Randolph recognized, that provides any authority needed for United States forces, acting as part of the MNF-I, to transfer individuals determined to be security internees within Iraq to Iraqi custody. 06-1666 Pet. App. 9. The authority of United States forces to operate in Iraq, and to hold security internees on behalf of the MNF-I or the Iraqi government, necessarily include any authority needed to transfer detainees to Iraqi authorities.

3. Iraq has sovereign discretion to establish modes of trial and punishment for offenses within its borders

Omar has argued (*Omar* C.A. Br. 39) that he would be deprived of due process by Iraqi authorities. That contention indicates that he seeks to use the United States courts improperly to collaterally attack foreign proceedings, but it provides no basis for enjoining his

transfer to Iraqi custody. "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States." *Neely*, 180 U.S. at 123; accord *Holmes*, 459 F.2d at 1219. That rule reflects "international comity [and] respect for the sovereignty of foreign nations on their own territory." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 408 (1990). "The interests of international comity are ill-served by requiring a foreign nation * * * to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced." *Ahmad* v. *Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990).

Even in the extradition context, "under what is called the 'rule of non-inquiry' * * * courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely." *Lopez-Smith* v. *Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997); see, *e.g.*, *United States* v. *Kin-Hong*, 110 F.3d 103, 110-111 (1st Cir. 1997). Thus, for example, courts will not consider evidence regarding the requesting country's "law enforcement procedures and its treatment of prisoners." *Ahmad*, 910 F.2d at 1067. Rather, "it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state." *Prasoprat* v. *Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006); accord *In re Requested Extradition of Smyth*, 61 F.3d

711, 714 (9th Cir. 1995), amended by 73 F.3d 887 (9th Cir.), cert. denied, 518 U.S. 1022 (1996).

The concerns underlying the rule of non-inquiry are even stronger here than in the extradition context, because Omar is already in Iraq and he therefore has no legal right to evade Iraqi jurisdiction. Moreover, the United States has a unique relationship with the Iraqi justice system, as the United States is working closely with the Government of Iraq to rebuild that country's vital governmental institutions, including its courts. For the courts of the United States to reach out to determine that Iraqi courts are not acceptable fora for the trial of United States citizens would fail to accord Iraq's courts the respect they are due under the principles of international comity on which *Neely* rests.

Omar has asserted (07-394 Br. in Opp. 6-7) that he would be tortured if he were transferred to the Iraqi government. That allegation provides no basis for a United States court to enjoin his transfer, either. The United States would object to the MNF-I's transfer of Omar or Munaf to Iraqi custody if it believed that they would likely be tortured. Even in the extradition context, however, that is fundamentally a foreign affairs determination under the rule of non-inquiry, based in part on the Executive's assessment of the foreign country's legal system and, when the Executive considers it necessary, its ability to obtain foreign assurances it considers reliable—matters the Executive is uniquely well-positioned to consider. See 07-394 Pet App. 38a n.6 (Brown, J., dissenting in part).

B. The Injunction Against Providing Information To Iraq Or Permitting Iraq To Try Omar Is Especially Improper

The other aspects of the district court's unprecedented injunction in *Omar* are even more problematic under the principles discussed above and underscore the extent to which the courts have intruded on core Executive responsibilities and international comity.

1. The court of appeals ruled that, if the MNF-I releases Omar, it may not provide Iraqi authorities with information that would enable them to arrest Omar. 07-394 Pet. App. 22a-23a. As Judge Brown observed, "information sharing among sovereigns regarding the location of persons subject to arrest is a common and desirable practice, particularly in a situation like that in present-day Iraq." *Id.* at 33a. Such information sharing is critical to combating international terrorism and allowing nations to exercise their most basic police powers to maintain security. If the authorities of any nation had information that an individual the United States deemed a dangerous criminal was about to enter the United States, the United States would want that information and would try to reciprocate. Such information sharing is at a particular premium in light of the situation on the ground in Iraq. An order enjoining such coordination and communication is an extraordinary incursion on the Commander in Chief's powers and an extraordinary affront to the sovereign prerogatives of Iraq.

That is all the more so here, where, as Judge Brown observed, the injunction has "the deliberate purpose of foiling the efforts of the foreign sovereign to make an arrest on its own soil, in effect secreting a fugitive to prevent his capture." 07-394 Pet. App. 34a. The MNF-I detained Omar precisely because he is a confirmed security threat who committed hostile and war-like acts in an

active combat zone. Simply releasing him in an area of ongoing combat, without advance notice to the local sovereign, could have grave diplomatic and practical consequences.

The court of appeals rationalized the injunction against communications in a combat zone on the theory that Omar's release would otherwise amount to his transfer to Iraqi authorities. 07-394 Pet. App. 23a. That may be true, but the court of appeals drew the wrong conclusion. The sovereignty of Iraq and the ability of United States forces to coordinate with Iraqi authorities means that the traditional habeas remedy of release would amount to the kind of transfer Omar seeks to enjoin. But that only underscores the continuing correctness of the rule of *Hirota* and the difficulty of employing habeas in this context. That difficulty would not justify attempting to create an effective "release" through the absurd requirement that the MNF-I must, for example, release Omar in the dead of night with an eight-hours' head start before notifying Iraqi authorities that it had released an allegedly dangerous criminal (or, in Munaf's case, a convicted criminal) within its borders.

2. The court of appeals compounded its error by directing that Omar not be brought before the CCCI for trial, even if he remained in MNF-I custody. 07-394 Pet. App. 25a. Even if a United States court could prevent Iraq from assuming custody of Omar, there would be no justification for preventing the Iraqi courts from adjudicating his guilt or innocence while he remained in the MNF-I's custody. The court of appeals' unfounded speculation that Iraq might seize Omar from the MNF-I, *id.* at 25a-26a, is refuted by the government's declaration explaining that he would remain in MNF-I custody during proceedings before the CCCI, *id.* at 106a. Indeed,

the Iraqi courts tried Munaf while he remained in MNF-I custody, without attempting any such seizure.

Moreover, in the status-of-forces context, when a foreign nation exercises criminal jurisdiction over a member of the United States military, the United States commonly retains physical custody of the individual during the judicial proceedings in the foreign nation's courts. See *International Extradition* 95. Although the United States generally has no legal right to insist on retaining custody, foreign nations frequently agree to the accommodation. See *Cozart*, 236 F.2d at 733. Omar has no legal entitlement to greater protection than our soldiers receive by the grace of other nations.

To be sure, if Iraqi courts convicted Omar of criminal offenses, that action would underscore the absence of any basis for the United States courts to enter an injunction against his release to Iraqi custody. At that point, Omar's habeas petition would amount to an impermissible collateral attack on his Iraqi conviction. Indeed, Munaf's habeas petition is now in precisely that untenable posture. As discussed, however, the writ of habeas corpus provides no license for the United States courts to sanction collateral attacks on foreign proceedings. Habeas corpus does not allow direct attacks on foreign judgments, and it does not allow a court to achieve the same result indirectly by enjoining a foreign criminal proceeding from reaching judgment.

In sum, the injunction upheld in *Omar* interferes with the United States' international commitments to the U.N., the other countries comprising the multinational force, and the Government of Iraq; overrides the determinations of a multinational force acting pursuant to authority derived from the U.N. at the request of Iraq; intrudes on Iraq's sovereign interest in prosecut-

ing serious criminal offenses committed within its own territory; and impedes the fundamental mission of the multinational force to help bring security and stability to Iraq. It finds no support in existing precedent and it should be set aside by this Court.

CONCLUSION

The judgment of the court of appeals in No. 06-1666 should be affirmed. The judgment of the court of appeals in No. 07-394 should be reversed.

Respectfully submitted.

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